

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
REQUEST TO REDUCE PRE-HARVEST) Docket No. EPA-HQ-OPP-2007-0181
INTERVAL FOR EBDC FUNGICIDES)
ON POTATOES)

**ORDER ON MOTION TO DEFER RULING
AND ON MOTION TO EXTEND TIME
TO FILE PREHEARING EXCHANGES**

Background and Parties' Arguments

A Notice of Hearing on Request to Reduce Pre-Harvest Interval for EBDC Fungicides ("EBDCs") on Potatoes was published in the Federal Register on July 11, 2007, by the Acting Director of the Special Review and Reregistration Division of the Office of Pesticide Programs, United States Environmental Protection Agency ("EPA"), under the authority of 40 C.F.R. Part 164 Subpart D ("Subpart D"). 72 Fed. Reg. 37771 (July 11, 2007). The Natural Resources Defense Counsel ("NRDC") filed a request for hearing on August 10, 2007. The EBDC/ETU Task Force ("Task Force"), which represents certain registrants of EBDCs, is "automatically" a party to this proceeding according to the Notice of Hearing, and filed its Notice of Appearance on August 24, 2007. The EPA is also "automatically" a party to this proceeding. 72 Fed. Reg. at 37778. The National Potato Council ("NPC") was granted leave to intervene on September 18, 2007. By Prehearing Order dated September 19, 2007, the parties were directed, *inter alia*, to file their prehearing exchanges.

On October 15, 2007, EPA, the Task Force and NPC ("Movants") jointly moved for an extension of time to file their prehearing exchanges and requested an early prehearing conference to discuss the scope of the hearing. NRDC filed an opposition to the motion, noting that the Movants had not stated their position as to the scope of the hearing. Movants replied, asserting that EPA made a misstatement in the Notice of Hearing by listing therein as an issue to be adjudicated the question of whether the applicant, through due diligence, could have discovered the substantial new evidence prior to issuance of the cancellation order (the "due diligence" issue), which EPA asserts is an issue that the EPA Administrator determines before issuing the Notice of Hearing. Movants therefore request that the September 19th Prehearing Order be amended to delete the request for information as to the "due diligence" issue, set forth in Paragraph 2(C) of the Prehearing Order. Movants also indicated that there is a dispute between Movants and NRDC as to whether certain risk issues are within the scope of the hearing.

By Order dated October 29, 2007, the request for an early prehearing conference to discuss the scope of issues was denied, NRDC was provided an opportunity to respond to the Movants' request to amend the Prehearing Order to remove Paragraph 2(C), and the prehearing exchange schedule was extended, providing Movants until December 7, 2007 to file their prehearing exchanges.

On November 7, 2007, NRDC filed a Surreply in Response to Motion for Extension of Time to File Pre-Hearing Documents and Request for a Pre-hearing Conference ("Surreply"), opposing Movants' request to remove Paragraph 2(C) from the Prehearing Order. NRDC argues that the issue of "due diligence" is within the scope of this hearing and must be adjudicated by this Tribunal under the Part 164 Subpart D regulations and basic notions of fairness and due process. The issues for hearing NRDC asserts are whether substantial new evidence exists and whether it requires reversal or modification of the cancellation order. 40 C.F.R. § 164.132(a). NRDC argues that if the evidence was or could have been available, through exercise of due diligence, at the time of the prior cancellation proceeding, it is not "new evidence," and could not "require reversal or modification of the existing cancellation." *Id.* NRDC claims that the concept of waiver applies, as in cases in which the right to present evidence in support of reconsideration is waived when it could have been presented in the prior proceeding. Granting unreviewable authority to the EPA to decide whether due diligence was exercised, NRDC alleges, is inconsistent with the purposes of Subpart D proceedings - to require a showing of substantial new evidence and protect the integrity of public participation by requiring the same formal hearing process as in the underlying cancellation proceeding, citing to the preamble to the Subpart D regulations, 40 Fed. Reg. 12261, 12264 (March 18, 1975) and the "interests of justice" referenced in 40 C.F.R. § 164.40(d). NRDC argues further that applicants which do not present available evidence in the cancellation proceeding should not be allowed a second chance to do so, thereby undoing the cancellation proceeding, wasting administrative resources, and perhaps "gaming" the cancellation process.

On November 15, 2007, Movants filed a Joint Motion to Defer Ruling on the Outstanding Issues in Movants' Motion for Extension of Time to File Pre-Hearing Documents and Request for a Pre-Hearing Conference ("Motion to Defer Ruling"), announcing therein that EPA intended to publish an amendment to its July 11, 2007 Notice of Hearing revising EPA's statement of issues and explaining that the "due diligence" issue is a threshold issue for the Administrator to decide. Therefore, Movants suggest that a ruling on whether the "due diligence" issue must be adjudicated is not necessary. Further, Movants request that, if this Tribunal deems "due diligence" to be an issue within its jurisdiction, that they be granted leave to reply to the arguments in NRDC's Surreply, because they "strongly disagree with NRDC's interpretation of the law and the nature of Subpart D proceedings." Motion to Defer Ruling at 2. Movants state that upon publication in the Federal Register of the amended Notice of Hearing, EPA likely will file a further motion to amend the Prehearing Order and request for extension of time to file prehearing exchanges. *Id.* at 3. In light of the timing of EPA's intended actions, Movants request deferral of any ruling on the "due diligence" issue until this Tribunal receives the amended Notice of Hearing. Movants suggest that a ruling as to any amendments to the

Prehearing Order be deferred until after filing of their motion to amend the Prehearing Order, and the response and reply thereto.

On November 19, 2007, NRDC submitted an Opposition to the Motion to Defer Ruling, noting that it does not dispute that EPA may amend the Notice of Hearing pursuant to 40 C.F.R. § 164.23(b), but reiterating that the Subpart D regulations and the interests of justice require that NRDC be allowed to contest the due diligence issue and that the issue be considered by this Tribunal in this proceeding. Otherwise, NRDC argues, the integrity of this proceeding and the prior cancellation proceedings would be undermined. NRDC asserts that Movants have not responded to these arguments nor articulated why this Tribunal should attach greater weight to an amended notice of hearing than to a brief responding to the Surreply. NRDC urges that the request to amend the Prehearing Order has now been briefed and is ripe for adjudication, and the possibility that Movants may move to amend the Prehearing Order is not a sufficient reason to delay ruling on the request. NRDC also opposes the request for further extension of time to file prehearing exchanges, stating that it has an interest in the efficient and timely resolution of this proceeding.

On November 30, 2007, EPA submitted a Motion for Extension of Time to File Prehearing Exchanges (“Motion for Extension”), requesting that the deadline for its prehearing exchange be extended to six weeks after the date that an amended Prehearing Order is issued or the date that a determination is made that an amendment to the Prehearing Order is not required. The Task Force and NPC join EPA in the Motion for Extension, and EPA states that NRDC takes no position on the Motion for Extension. EPA explains in the Motion that its amended Notice of Hearing, which was signed on November 30, 2007, amends the issues for hearing, that within a few days EPA will be filing a motion to amend the Prehearing Order to conform it to the issues listed in the amended Notice of Hearing, and that time is needed for this Tribunal to review the Notice and any subsequent motions and responses.

Discussion and Conclusions

Currently pending are Movants’ request to amend the Prehearing Order to delete Paragraph 2(C), Movants’ Motion to Defer Ruling on that request, and EPA’s Motion for Extension.

The question of whether Paragraph 2(C) should be removed from the Prehearing Order depends on whether the “due diligence” issue is properly within the scope of the hearing. The amended Notice of Hearing states that EPA is deleting the “due diligence” issue from the statement of issues for hearing because it is to be determined by the Administrator prior issuing the Notice of Hearing, and is not to be considered by the Administrative Law Judge, according to the regulation, 40 C.F.R. § 164.132(a), and its preamble at 53 Fed. Reg. 12261, 12264. NRDC has indicated in its Surreply and in its Opposition to the Motion to Defer that it contests EPA’s position.

The question arises, whether the list of issues for hearing as set forth in the amended

Notice of Hearing can be contested and/or amended again. If not, then there is no question that Paragraph 2(C) must be deleted from the Prehearing Order, and there would be no reason to defer any such ruling. Moreover, this Tribunal can amend the Prehearing Order to conform it to the list without the need for the parties to expend resources on filing motions and responses as to amending the Prehearing Order. On the other hand if the list of issues can be contested, then a ruling on whether Paragraph 2(C) should be deleted should not be issued until EPA has an opportunity to file a reply to NRDC's Surreply and Opposition to the Motion to Defer Ruling. The parties have not briefed the issue of whether EPA's list of issues for hearing published in a Notice of Hearing may be contested.

There are only two issues listed for hearing in the amended Notice of Hearing, whereas the July 11, 2007 Notice of Hearing listed four issues of fact and three issues of law for the hearing. This discrepancy evidences a lack of certainty as to the issues which are properly within the scope of the hearing in this matter. However, the lack of certainty is not surprising given that there was no hearing in the original cancellation proceeding,¹ and that there have been very few proceedings under Subpart D since the inception of the Agency to provide any guidance.

Generally, the scope of trial in federal court is determined initially by the allegations in the complaint which are not admitted in the answer and any affirmative defenses. The scope then may be narrowed by rulings on pretrial motions, agreements and stipulations of the parties, and orders issued pursuant to Federal Rule of Civil Procedure ("FRCP") 16(e). *E.g.*, *Valdes v. Leisure Resources Group, Inc.*, 810 F.2d 1345, 1357 (5th Cir. 1987)(FRCP 16(e) "instructs judges to enter pre-trial orders to define the scope of issues for trial); *Fararo v. Sink LLC*, No. 01 C 6956, -6957, 2004 U.S. Dist. LEXIS 5367 * 4 (N.D. Ill. March 29, 2004)(plaintiffs draft pre-trial order defining issues for trial, and defendant writes objections to it, or parties agree to issues for hearing at a prehearing conference); *Biglow v. Boeing Co.*, 174 F. Supp 2d 1187, 1195 (D. Kan. 2001)(court determines scope of issues for trial by ruling on pretrial motions).

Thus, if parties do not agree on the scope of a hearing, they should be given an opportunity to brief their positions. Given that this is a Subpart D proceeding, the questions of whether the scope of hearing can be contested, and if so, which issues should be presented at the hearing, should be briefed. Indeed, the question of whether an issue is within the scope of a hearing concerning pesticide cancellation was the subject of an interlocutory appeal of an Administrative Law Judge's ruling many years ago. *See, Shell Oil Company*, 1 E.A.D. 517 (Judicial Officer, April 9, 1979). That case involved EPA's proposal to conditionally cancel some uses of a pesticide in a Notice of Intent to Cancel a pesticide, and whether objections to the proposed relief (the conditional cancellation rather than a total cancellation) could expand the

¹ The Accelerated Decision and Order and the Settlement Agreement incorporated therein provide very little information as to the underlying issues. *American Food Security Coalition*, FIFRA Docket No. 646 *et al.*, 1992 EPA ALJ LEXIS 862 (June 16, 1992).

scope of the hearing. In a Subpart D proceeding, an Administrative Law Judge ruled on arguments of EPA to limit the scope of evidence admissible at the hearing. *Notice of Hearing on the Applications to Use Sodium Fluoroacetate (Compound 1080) to Control Predators*, FIFRA Docket No. 502 (ALJ, Initial Decision, 1984), slip op. at 42-44.

Therefore, it is appropriate to allow the parties an opportunity to brief the issues mentioned herein. Accordingly, the Motion to Defer Ruling and the Motion for Extension of Time are granted.

ORDER

1. The EPA's request for extension of time to file prehearing exchanges is hereby **GRANTED**. The deadlines for the Prehearing Exchanges are hereby suspended and shall be reset by future order.
2. The Movants' Motion to Defer Ruling is **GRANTED**. Movants shall file any reply to the NRDC's November 7, 2007 Surreply on or before December 12, 2007, regarding the request to delete item 2(C) from the Prehearing Order.

Susan L. Biro
Chief Administrative Law Judge

Dated: December 3, 2007
Washington, D.C.

In The Matter of Hearing On Request to Reduce Pre-Harvest Interval For EBDC Fungicides On Potatoes, Docket No. EPA-HQ-OPP-2007-0181

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Motion to Defer Ruling and On Motion to Extend Time to File Prehearing Exchanges, dated December 3, 2007, was sent this day in the following manner to the addresses listed below.

Sybil Anderson
Headquarters Hearing Clerk

Dated: December 3, 2007

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